

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC 2002-000743

10/20/2003

HONORABLE MICHAEL D. JONES

CLERK OF THE COURT
P. M. Espinoza
Deputy

FILED: _____

RUSTYN L SHERER

LAWRENCE I KAZAN

v.

STACEY K STANTON
HARRY G MCFATE

JACQUELINE H GANIER
GEOFFREY T JONES

OFFICE OF ADMINISTRATIVE
HEARINGS

MINUTE ENTRY

Pursuant to A.R.S §12-910(e) this court may review administrative decisions in special actions and proceedings in which the State is a party:

The court may affirm, reverse, modify or vacate and remand the agency action. The court shall affirm the agency action unless after reviewing the administrative record and supplementing evidence presented at the evidentiary hearing the court concludes that the action is not supported by substantial evidence, is contrary to law, is arbitrary and capricious or is an abuse of discretion.

The scope of review of an agency determination under administrative review places the burden upon the plaintiff to demonstrate that the hearing officer's decision was arbitrary, capricious, or involved an abuse of discretion.¹ The reviewing court may not substitute its own discretion for that exercised by the hearing officer,² but must only determine if there is any competent evidence to sustain the decision.³

¹ *Sundown Imports, Inc. v. Ariz. Dept. of Transp.*, 115 Ariz. 428, 431, 565 P.2d 1289, 1292 (App. 1977); *Klomp v. Ariz. Dept. of Economic Security*, 125 Ariz. 556, 611 P.2d 560 (App. 1980); also see *Caretto v. Arizona Dept. of Transp.* 192 Ariz. 297, 965 P.2d 31 (App. 1998).

² *Ariz. Dept. of Economic Security v. Lidback*, 26 Ariz. App. 143, 145, 546 P.2d 1152, 1154 (1976).

³ *Schade v. Arizona State Retirement System*, 109 Ariz. 396, 398, 510 P.2d 42, 44 (1973); *Welsh v. Arizona State Board of Accountancy*, 14 Ariz.App. 432, 484 P.2d 201 (1971).

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Only where the administrative decision is unsupported by competent evidence may the trial court set it aside as being arbitrary and capricious.⁴ In determining whether an administrative agency has abused its discretion, we review the record to determine whether there has been "unreasoning action, without consideration and in disregard for facts and circumstances; where there is room for two opinions, the action is not arbitrary or capricious if exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached."⁵

This matter has been under advisement and the court has considered and reviewed the record of the proceedings from the administrative hearing, exhibits made of record and the memoranda submitted. Here, Plaintiff, Rustyn L. Sherer, seeks review of an administrative order. After a careful review of the record, I find ample Arizona law and substantial competent evidence to affirm the decision of the administrative agency - The Executive Hearing Office of the Arizona Department of Transportation.

On August 10, 2002, Plaintiff was pulled over by Officer Tommy of the Scottsdale Police Department, for failure to stop at a red light. Once Officer Jensen noticed that Plaintiff exhibited signs of intoxication, he asked Plaintiff to take a field sobriety test. Plaintiff failed the tests administered by Officer Jensen, then refused to take a preliminary breath test. Plaintiff was consequently arrested for DUI, a violation of A.R.S. §28-1381. Officer Jensen read the Admin Per Ser admonitions to Plaintiff, and asked Plaintiff to submit to a blood test, but Plaintiff claimed he was having trouble hearing the officer due to traffic noise. Plaintiff was taken to Scottsdale District One Police Station where he was given access to a phone room for thirty (30) minutes; Plaintiff did not attempt to use the phone. Officers read the Admin Per Ser admonitions to Plaintiff three more times, and warned Plaintiff that he could not further delay the blood test. It was apparent to the officers that Plaintiff was playing games, so the officer checked "No" in the box concerning Plaintiff's willingness to take the test. Plaintiff license was suspended for twelve (12) months, as required by A.R.S. §28-1321(B).⁶ The Executive Hearing Office of the Arizona Department of Transportation heard the matter and determined that Plaintiff's conduct constituted a refusal to take the blood test and the 12-month license suspension was appropriate. Plaintiff now brings the matter before this court.

⁴ *City of Tucson v. Mills*, 114 Ariz. 107, 559 P.2d 663 (App. 1976).

⁵ *Tucson Public Schools, District No. 1 of Pima County v. Green*, 17 Ariz.App. 91, 94, 495 P.2d 861, 864 (1972), as cited by *Petrus v. Arizona State Liquor Board*, 129 Ariz. 449, 452, 631 P.2d 1107, 1110 (App. 1981).

⁶ "After an arrest a violator shall be requested to submit to and successfully complete any test or tests prescribed by subsection A of this section, and if the violator refuses the violator shall be informed that the violator's license or permit to drive will be suspended or denied for twelve months, or for two years for a second or subsequent refusal within a period of sixty months, unless the violator expressly agrees to submit to and successfully completes the test or tests...." [emphasis added]

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The only issue before this court is whether Plaintiff's conduct constituted a refusal to take the blood test. In a recent decision,⁷ the Arizona Court of Appeals ruled that an arrested motorist is deemed, under the implied consent law, to have refused to submit to testing when his or her conduct is such that a reasonable person in the officer's position would be justified in believing that the motorist was capable of refusal and manifested an unwillingness to submit to the test. These are precisely the circumstances in the case at hand. Plaintiff's conduct clearly shows an unwillingness to submit to the blood test. Given the benefit of the doubt, Plaintiff may not have been able to hear the officer's reading of the Admin Per Ser admonitions. However, one Plaintiff was at the police station, he admits that there was "face-to-face contact where it was quiet in the phone room and [he] could hear the officer and the statements that [the officer] was reading."⁸

Plaintiff's educational background and employment responsibilities, coupled with the fact that Officer Jensen explained and read the Admin Per Ser admonitions to Plaintiff on numerous occasions⁹ - and Plaintiff admitted hearing the officer at the police station - it certainly strains credulity that Plaintiff could not understand the Admin Per Ser admonitions. Among the Arizona legislature's purposes in enacting DUI statutes were: 1) to remove impaired drivers from our highways; 2) to ease our State's burden of proving intoxication; and 3) to increase the certainty that impaired drivers are penalized even if they refuse testing.¹⁰ Plaintiff was undoubtedly able to understand the admonitions and chose to play games with the officers rather than comply with Arizona law.

This court affirms the administrative agency's decision, for it was clearly supported by Arizona law and substantial competent evidence, and was not arbitrary, capricious, or an abuse of the agency's discretion.

IT IS ORDERED affirming the decision of the administrative agency - The Executive Hearing Office of the Arizona Department of Transportation.

IT IS FURTHER ORDERED DENYING all relief as requested by the Plaintiff in his complaint.

IT IS FURTHER ORDERED that counsel for the Defendant shall prepare and lodge a judgment consistent with this minute entry opinion no later than _____.

⁷ *Tornabene v. Bonine ex rel. Arizona Highway Dept.*, 203 Ariz. 326, 54 P.3d 355, 382 Ariz. Adv. Rep. 6 (App. 2002).

⁸ Transcripts, p. 19, ll. 14-15.

⁹ Plaintiff was also allowed to read the admonitions to himself.

¹⁰ *Caretto v. Arizona Dept. of Transp.*, 192 Ariz. 297, 965 P.2d 31, 2636 Ariz. Adv. Rep. 10 (App. 1998).